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No. 84-1707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TOM HUDSON AND ASSOCIATES, INC.,
GEORGE N. BAGDASARIAN, AND G.B. SERVICES, INC.,
dba SAN DIEGO REFUSE CO.,
Petitioners,

v.

CITY OF CHULA VISTA, SCA SERVICES, INC.,
AND CHULA VISTA SANITARY SERVICES, INC.,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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May 31, 1985

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The petition in this case is simply a convoluted plea for reconsideration of the two issues conclusively decided in *Town of Hallie v. City of Eau Clair*, ... U.S. ....; 105 S.Ct. 1713 (March 27, 1985) and *Southern Motor Carriers Rate Conference v. United States*, ... U.S. ....; 105 S.Ct. 1721 (March 27, 1985). Those issues are (1) the requisites for a state delegation of authority for a municipal government to supplant competition with municipal regulation, and (2) the extent of supervision required where a municipality regulates the provision of a traditional public service.

The bulk of petitioners' argument is addressed to the first issue, i.e. "how clearly a state policy must be articulated to a municipality to be able to establish that its anticompetitive activity constitutes state action." *Town of Hallie*, 105 S.Ct. at 1717; Ptn. at ii-iii, 14-18, 22-28. The Court has answered this question. State authorization of municipal regulation is sufficient if " 'the legislature contemplated the kind of action complained of.' " *Town of Hallie*, 105 S.Ct. at 1719, *quoting City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978). This is exactly the standard the Ninth Circuit applied, quoting the very same passage from *Lafayette*. *Tom Hudson & Associates, Inc. v. City of Chula Vista*, 746 F.2d 1370, 1373 (9th Cir. 1984); Ptn. Appx. at A-4.

While the application of the *Town of Hallie* standard to the present case is hardly an issue warranting review in this Court, it is an easy issue. There is no doubt that the California legislature "contemplated the kind of action complained of " — the statute in issue *expressly* authorized the City of Chula Vista to provide for trash collection in *precisely* the manner chosen. Cal. Gov't Code § 66,757. In fact, petitioners' attack is focused principally on the very clarity of that legislative authorization. *See e.g.*, Ptn. at 25. As the Court of Appeals said, "[t]he present case poses no close questions of legislative intent." *Hudson & Associates, supra*, 746 F.2d at 1373; Ptn. Appx. at A-5.

The remainder of the petition raises, in various ways, the second issue decided in *Town of Hallie* — "the question of whether action by a municipality — like action by a private party — must satisfy the 'active state supervision' requirement. . . . " 105 S.Ct. at 1717; Ptn. 18-22, 27. On this point, the Ninth Circuit was likewise correct in its anticipation of this Court's holding. In *Town of Hallie*, the Court held that: "the active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Town of Hallie*, 105 S.Ct. at 1720 (footnote omitted). The Court of

Appeals used, if anything, a more narrow standard in this case: "Municipalities . . . need make no showing of supervision by the State in suits challenging 'traditional municipal functions.' . . ." *Hudson & Associates,* 746 F.2d at 1373; Ptn. Appx. at A-4.

The petitioners contend that the actor here is not the city but Chula Vista Sanitary Service, a private firm. Ptn at 20. The "active supervision" test clearly applies to a private actor. *Town of Hallie,* 105 S.Ct. at 1720 n.10. The Ninth Circuit correctly noted that the prices charged for trash collection service in Chula Vista are, in law and in reality, the result of municipal action. "[T]he rates in effect are directly attributable to action of the city. . . ." *Hudson & Associates,* 746 F.2d at 1374; Ptn. Appx. at A-7.

On the other hand, if rates are considered to result from private action (because the private franchisee may apply for rate changes), there is, likewise, no issue requiring the Court's attention. The Court of Appeals held, as the record required it to hold, that there is active supervision of CVSS' rates by the City of Chula Vista:

> "Chula Vista does not passively accept the rate proposals submitted by CVSS. All rate proposals are reviewed by the city finance department and must be approved by vote of the City Council." *Hudson & Associates,* 746 F.2d at 1374; Ptn. Appx. at A-7.[1] *See also, United States v. Southern Motor Carriers Rate Conf.,*

[1] Petitioners ask the Court to take judicial notice of an amendment of the 1982 franchise which provides, *inter alia,* for automatic approval of cost-of-living increases and pass-through of certain costs. Ptn. Appx. D14-16. All such changes in rates are subject to review and rejection by the city. *Id.* This outside-the-record change in the manner chosen by the City of Chula Vista to regulate trash collection rates does not undermine the Court of Appeals' holding that Chula Vista Sanitary Service ("CVSS") has been actively supervised as to its rates. The only increases CVSS may implement without specific prior authorization of the city are those resulting from clerical application of an objective formula mandated and approved by the city.

702 F.2d 532, 539 (5th Cir. 1983), *aff'd*, ... U.S. . ....., 105 S.Ct. 1721 (March 27, 1985).

It serves no purpose to reply to petitioners' long-winded attack on the *wisdom* of the California legislature's decision to delegate both the discretion and the authority to enable local officials to provide for trash collection in the manner best suited to the circumstances of the locality served. Ptn. 20-25. This Court has already answered all those arguments. *Town of Hallie,* 105 S.Ct. at 1719; *Southern Motor Carriers Rate Conference v. United States,* 105 S.Ct. at 1731. *And see, California Reduction Co. v. Sanitary Reduction Works,* 199 U.S. 306, 321 (1905). Petitioners urge that California's 5000 special districts, 480 cities and 58 county agencies are presumptively venal or incompetent. Contrary to this, this Court's holding that "[w]e may presume, absent a showing to the contrary, that [a] municipality acts in the public interest." *Town of Hallie,* 105 S.Ct. at 1720 (footnote omitted).

The petition presents no meritorious or important issue, and should be denied.

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